A

Raphael Pura v Insas Bhd & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–662 OF 1999
AHMAD FAIRUZ, MOKHTAR SIDIN AND DENIS ONG JJCA
16 NOVEMBER 2000

B

Civil Procedure *— Judgments and orders — Pre-judgment — Judge's statement in open court and contempt proceedings against appellant's witness in related suits — Whether trial judge's statement in related proceedings pre-judge issues for determination at trial — Whether basis to suspect that fair trial would not be possible*

C

The respondent filed a suit ('the suit') against the appellant for damages premised upon slander and libel arising from a published article. Pertaining to the same article, there were five other defamation suits ('the five suits') filed. Since the parties in the five suits had reached an amicable settlement, the trial judge had on 21 October 1999, read a statement recording the settlement in open court ('the open court statement'). However, one of the defendants in the five suits, Tommy Thomas, subsequently issued a press statement to the effect that the settlement was reached despite his objections. This was later retracted by Tommy Thomas. The trial judge issued a notice to Tommy Thomas to show cause as to why he should not be cited for contempt of court. In his written judgment, the trial judge found Tommy Thomas guilty of contempt and sentenced him to six months' imprisonment. The appellant contended that the trial judge's open court statement were without the benefit of any evidence tendered, and stressed that the matters in the statement went to the heart of the appellant's defence and formed issues and questions for the determination of the trial judge in the suit. The respondent pointed out that the trial judge's statement was confined to the five suits and had no bearing on this suit. The appellant also stated that the trial judge's written judgment made very adverse and disparaging remarks about Tommy Thomas, who was a witness for the appellant in the trial of the suit. These circumstances gave rise to the danger that Tommy Thomas' testimony would not be received with an open mind by the trial judge. The appellant's oral application for the trial judge to excuse himself from hearing and determining the suit was earlier dismissed. Thus this appeal.

D

E

F

G

H

Held, dismissing the appeal with costs:

(1) As to the test for bias, the learned trial judge had rightly and consistent with the appellant's counsel's submission, applied the 'real danger test' (see p 119C).

(2) The court agreed with the respondents that the trial judge's statment was confined to the five suits, due to the fact that the defendants in those suits tendered apologies for the defamatory statements and also admitted that they were untrue. The court also agreed with the respondents that the words complained of

I

and attributed to the defendants in the suits were not the same as the ones attributed to the appellant, and that a reasonable and fair minded person sitting in court and knowing all the relevant facts would not suspect that there would not be a fair trial (see p 118D–F).

(3) The court further found that the trial judge had not erred in law or in fact when he stated that his statement was made purely upon the unreserved apology tendered by the defendants in the five suits and that it was made in the context of open court, and when the trial judge stated that the finding of guilt in Tommy Thomas' contempt of court proceedings would not render his testimony in the appellant's case unacceptable because it would be tested in cross examination (see pp 118G, 119B); *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213 followed.

[**Bahasa Malaysia summary**

Responden telah memfailkan suatu guaman ('guaman tersebut') terhadap perayu untuk ganti rugi berdasarkan slander dan libel yang berbangkit daripada suatu rencana yang diterbitkan. Berkenaan dengan rencana yang sama, lima tindakan fitnah yang lain ('lima guaman tersebut') telah difailkan. Oleh kerana pihak-pihak di dalam lima guaman tersebut telah bersetuju mencapai penyelesaian, hakim perbicaraan telah pada 21 Oktober 1999, membaca suatu kenyataan merekodkan penyelesaian di mahkamah terbuka ('kenyataan mahkamah terbuka tersebut'). Namun, salah seorang defendan-defendan di dalam lima guaman tersebut, Tommy Thomas, kemudian mengeluarkan kenyataan akhbar dengan kesan bahawa penyelesaian telah dicapai walaupun dengan bantahan-bantahannya. Ini kemudiannya ditarik balik oleh Tommy Thomas. Hakim perbicaraan telah mengeluarkan notis kepada Tommy Thomas untuk menunjukkan sebab mengapa beliau tidak patut dinamakan untuk penghinaan mahkamah. Di dalam penghakiman bertulisnya, hakim perbicaraan mendapati Tommy Thomas bersalah untuk penghinaan dan menjatuhkan hukuman enam bulan penjara. Perayu menegaskan bahawa kenyataan hakim perbicaraan di mahkamah terbuka tersebut adalah tanpa faedah sebarang keterangan yang dikemukakan, dan menegaskan bahawa perkara-perkara di dalam kenyataan tersebut adalah bersangkut-paut dengan pembelaan perayu dan membentuk isu-isu dan persoalan-persoalan untuk penentuan hakim perbicaraan di dalam guaman tersebut. Responden menunjukkan bahawa kenyataan hakim perbicaraan adalah terbatas kepada lima guaman tersebut dan tidak mempunyai kesan ke atas guaman ini. Perayu juga menyatakan bahawa penghakiman bertulis hakim perbicaraan telah membuat kenyataan bertentangan dan merendahkan Tommy Thomas, yang merupakan saksi bagi perayu di dalam perbicaraan guaman tersebut. Keadaan-keadaan ini membangkitkan bahaya bahawa keterangan Tommy Thomas tidak akan diterima dengan

pemikiran yang terbuka oleh hakim perbicaraan. Permohonan lisan perayu bagi hakim perbicaraan untuk menghalang dirinya daripada mendengar dan menentukan guaman tersebut telah sebelumnya ditolak. Maka rayuan ini dibuat.

Diputuskan, menolak rayuan tersebut dengan kos:

(1) Berkenaan dengan ujian berat sebelah, hakim perbicaraan telah dengan betul dan konsisten dengan hujahan peguam perayu, menerima 'ujian bahaya sebenar' (lihat ms 119C).

(2) Mahkamah bersetuju dengan responden-responden bahawa kenyataan hakim perbicaraan adalah terbatas kepada lima guaman tersebut, kerana hakikat bahawa defendan-defendan di dalam guaman-guaman tersebut telah memohon maaf untuk kenyataan-kenyataan fitnah dan juga mengakui bahawa ia adalah tidak benar. Mahkamah juga bersetuju dengan responden-responden bahawa perkataan-perkataan yang diadukan dan dikaitkan kepada defendan-defendan di dalam guaman-guaman tersebut bukanlah yang sama dikaitkan dengan perayu, dan seorang munasabah dan bersifat waras yang menghadiri mahkamah dan mengetahui semua fakta yang relevan tidak akan mensyaki bahawa tidak terdapat perbicaraan yang tidak adil (lihat ms 118D–F).

(3) Mahkamah selanjutnya mendapati bahawa hakim perbicaraan tidak silap dari segi undang-undang dan fakta apabila beliau menyatakan bahawa kenyataannya dibuat semata-semata berdasarkan permintaan maaf yang dibuat tanpa was-was oleh defendan-defendan di dalam lima guaman tersebut dan ia dibuat menurut konteks mahkamah terbuka, dan apabila hakim perbicaraan menyatakan bahawa penemuan bersalah prosiding penghinaan mahkamah Tommy Thomas tidak akan menjadikan keterangan di dalam kes perayu tidak boleh diterima oleh kerana ia akan diuji semasa pemeriksaan balas (lihat ms 118G, 119B); *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213 diikut.]

Cases referred to

Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213 (folld)

Appeal from: Civil Suit No S2–23–42–1996 (High Court, Kuala Lumpur)

Cecil Abraham (*Muhammad Shafee Abdullah, Gurmeet Kaur and G Rajasingam* with him) (*Shafee & Co*) for the appellant.

V Sivaparanjothi (*S Rutheran* and *S Ashokvijay* with him) (*Siva & Partners*) for the respondents.

Ahmad Fairuz JCA. (delivering judgment of the court): On 30 August 1999, the learned High Court judge dismissed the appellant's oral application to disqualify himself from hearing and determining suit No S2-23-42-96 ('the suit'). The appellant now appeals against that decision.

The respondents filed the suit against the appellant for damages premised upon slander and libel arising from an article entitled 'Malaysian Justice on Trial' published in the November issue of the International Commercial Litigation magazine. The suit had undergone various stages of case management by the learned judge. On 13 August 1999, the suit was at its last stage of case management and was fixed for hearing on 1 September 1999 and 6 September 1999 to 10 September 1999. It was at this stage that the appellant orally applied for the trial judge to excuse himself from hearing and determining the suit.

Pertaining to the abovementioned article, there were also five other defamation suits filed ('the five suits'). The parties to the five suits reached an amicable settlement and on 21 October 1998, a statement in open court was read out, after which the learned judge, inter alia, said:

> I do not intend to narrate the facts of this case. In the normal cicumstances, when a case fixed for hearing is settled, the judge makes no comments, save to record the settlement and to thank counsel. But I cannot let this case pass me by with a mere recording of the terms of settlement. It is pertinent for me to express my views upon matters leading to this case.
>
> It is now clear that the open court statement by the defendants puts paid to any suggestion that it is open to a litigant or his counsel to buy justice in this country. The unfounded and contumelious allegations made without any basis that justice is for purchase compels me to say a few words notwithstanding the magnanimous gestures of repentance by the defendants.
>
> Falsehood, if continuously repeated, takes on the mantle of truth. Allegations of improper conduct by the plaintiffs and their counsel in complicity with judges were the basis for these suits to have been commenced. The unreserved apology tendered herein completely vindicates the plaintiffs and their counsel, and needless to say reinforces the belief that the scales of justice in this country are ever evenly balanced.
>
> It is my fervent hope that with the closure of all these cases and the amicable settlement arrived at by all parties, everyone will see the futility of 'shooting from the hip'.

Subsequent to the settlement proceedings, one of the defendants in the five suits, Tommy Thomas, issued a press statement to the effect that the settlement 'was initiated, brokered and insisted upon by the insurers'. Mr Tommy Thomas also said in the press statement that the five suits were settled despite his express objections. Mr Tommy Thomas, however, retracted this press statement later. All these prompted the trial judge to issue, on his own motion, a notice to show cause as to why Mr Tommy Thomas should not be cited for contempt of court. This contempt proceeding resulted in a finding of guilt and a sentence of six months' imprisonment being imposed on Mr Tommy Thomas. In his written judgment the trial judge, inter alia, said:

All these actions arise out of an article published in a specialist legal journal called 'International Commercial Litigation'. The said publication is available in many countries including Malaysia. The impugned article was a cover story entitled '*Malaysian Justice on Trial*'. The article considered in damaging terms various decisions of the Malaysian courts in respect of certain named cases. The gravamen of the complaint about the article in the suits by the plaintiffs was that the said article accused the lawyers acting for the plaintiffs in the named suits of complicity in, or at least connivance at improperly seeking to obtain favours from the Judges concerned in the litigation in which they were involved.

It is appropriate for me at this juncture to refer to an old Roman saying: '*Quem deus pendere vult prius dementat*'. Translated it means 'Whom God wishes to destroy he first makes mad'.

Mr Tommy Thomas is a very senior member of the Bar and has been acting as lead counsel in many a leading case so often found in the law journals. He is not a fledging lawyer, unaware of the ramifications of acting in haste. I have searched through the evidence and re-read the affidavits. I have perused in detail each argument of Mr Abraham in mitigation. The pages are full of words expressing remorse and contrition. Yet to my mind I find that Mr Tommy Thomas has not been honest with the court. He has, in my view, not come clean. His explanation that the press statement which said that 'the actions were settled despite my express objections' was meant for the insurers, rang so hollow that it was almost an insult to the intelligence of the court to expect this court to be so gullible as to accept that explanation. He was asked both by me and Dato' Zaitun why he had to deal with the insurers through the press and even then he failed to come clean.

To my mind it is patently clear that by making an immediate statement in the press that the settlement was effected despite his express objections, Mr Tommy Thomas intended to portray to the world at large that he was never a willing party to the settlement. Having made disparaging and contumelious aspersions against the plaintiffs in the impugned article and having surreptitiously dragged the judiciary into the fray, Mr Tommy Thomas was a besotted adversary who would not sheath his sword until he had had the last say.

But alas for him, his anger and frustration has led him to his present predicament. Even to the very end he is not prepared to come clean, bare his soul and then seek the court's compassion.

However, in this case whilst Mr Tommy Thomas had apologized on numerous occasions, to my mind such apology is not sincere and open, but tainted with reservations. His explanation relating to notice to insurers has been rejected by this court.

His total disregard towards the feelings of the parties and the court in faxing the press statement shows the conduct of an exasperated litigant.

Besides, in the case before me, I have found that Mr Tommy Thomas' insistence in continuing to maintain his explanation that he had merely intended to convey his opposition to any settlement to the insurers only was a clear indication that he was not fully and completely contrite and remorseful. There was no need to speak to the insurers through the press.

The contemnor has continued to reflect his personal desire not to be open and candid with the court. Even on the day he was questioned by me if he had admitted truthfully his purpose for having made such a press statement this

court would have been compassionate. This attempt to insult the intelligence of the court by giving an explanation that not even a novice would want to proffer is an affront to the integrity of this Court..

The learned appellant's counsel contended that what the trial judge said (as quoted in para 3 above at p 116D–G), were said by him without the benefit of any evidence tendered by any of the parties to the five suits. It was urged upon us that the trial judge's statement were made in the context of the statement in open court wherein by para 7 therein, the complaints of the plaintiffs in the five suits are similar to the matters pleaded in the respondent's statement of claim. The appellant stressed that the matters in the trial judge's statement lie at the heart of the appellant's defence of justification, fair comment and qualified privilege and form issues and questions for the determination of the trial judge in the suit. It was argued that the statement of the trial judge indicates a preconceived view on the part of the judge of persons like the defendants in the five suits which includes the appellant. The statement also indicates, according to the appellant, at the very least an apparent prejudgment by the judge of the appellant's claim.

In reply, the learned respondent's counsel pointed out that the judge's statement, as quoted in para 3 above (at p 116D–G) was based on the open court statement and was confined to the five suits. The respondents urged us not to lose sight of the fact that the defendants in the five suits apologized for their defamatory statements and admitted that their statements were false and untrue. Thus, the judge's statement cannot, argued the respondents, have any bearing on the suit. The respondents further pointed out that the words complained of and attributed to the defendants in the five suits are not the same as the words complained of and attributed to the appellant in the suit. In the circumstances, the learned respondent's counsel submitted that a reasonable and fair minded person sitting in court and knowing all the relevant facts would have no ground to suspect that a fair trial would not be possible.

In his judgment, the learned trial judge emphasized that a perusal of his statement would show that it was made purely upon the unreserved apology tendered by the defendants in the five suits. His judgment further stated that his statement was made in the context of the statement in open court. Hence, the trial judge concluded that a reasonable and fair minded person sitting in court and knowing all the relevant facts would have no basis to suspect that a fair trial would not be possible.

As to the several passages from the learned judge's written judgment quoted in para 4 above ('the said passages') (at p 117A–I), it was the contention of the appellant that the trial judge has made very adverse and disparaging remarks and/or findings against Mr Tommy Thomas. The judge also cast aspersions as to Tommy Thomas' sanity by the choice of the Latin quotation therein. And Tommy Thomas, according to the appellant, is scheduled to be called as his witness at the trial of the suit. In the light of these circumstances, it was argued by the appellant that the said passages in particular and the written judgment in general would give rise to a

perception on the part of the public that there would be a real danger that Tommy Thomas' testimony in the suit would not be received with an open mind by the trial judge.

On this Tommy Thomas issue, the learned trial judge, in his judgment, inter alia; said:

> Just because he was found guilty of contempt cannot, by any stretch of the imagination, render Tommy Thomas' evidence in this case unacceptable. The truth of what Tommy Thomas will say in evidence will be tested by cross-examination. Evidence will be given and recorded in open court, and the court will only decide with an open mind, based on the evidence given.

As to the test for bias, the learned trial judge had rightly and consistent with the appellant's counsel's submission, applied the 'real danger test'. As to the issue of the application being made orally and without any supporting affidavit, we agree with the appellant that there was no need for affidavit evidence as the application was premised upon court papers and the learned trial judge's written judgment.

On the premise of matters stated in the above paragraphs, we agree, for the reasons stated therein, with the submissions of the learned respondent's counsel, as briefly stated in para 6 (at p 118E) above. We also find that the learned trial judge had not erred in law or in fact when he held as summarized in paras 7, 9 and 10 (at pp 118G, 119B, 119C) above. The learned judge had also rightly, in his judgment, referred to the case of *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213 after which he said:

> Whilst I agree that Gopal Sri Ram JCA made that comment in respect of a comment made by a judge at an interlocutory stage and that his Lordship had also held that the same judge may, after expressing a view in the course of an interlocutory proceeding, quite properly after hearing the main action, come to the opposite conclusion, it is my view that the same principle ought to apply to the comment made by me based on the 'statement in open court' and which comment therefore cannot in any way amount to a pre-judgment of issues or facts or showing bias, or a real likelihood of bias or a real suspicion of bias.

We would further say that Gopal Sri Ram's JCA comment as referred to by the learned trial judge in the above quoted passage ought to apply too to the judge's comments on Tommy Thomas in his contempt of court matter. In the circumstances, the appeal had to be dismissed with costs.

Appeal dismissed with costs.

Reported by Chew Phye Ken